

## **REMARKS/ARGUMENTS**

Applicant respectfully requests reconsideration of the present application in view of the following remarks, which are responsive to the Final Office Action mailed August 2, 2010.

### **I. Interview**

Applicant's attorney wishes to thank the Examiner for the telephonic interview on October 27, 2010. In the interview, Applicant's attorney and the Examiner discussed the references cited in the Office Action and each party's understanding of the references and the claims in the pending application. This response includes portions of the arguments discussed in the interview.

### **II. Status of the Claims**

In the Office Action, Claims 1, 4-7, 12, 16-22, and 26-27 were noted as pending in the application, and all claims were rejected. Claims 1, 12, 16, 18-19, and 21-22 have been amended to further clarify the claimed invention over the cited references. Additionally, new dependent Claims 29-30 have been added. As a result of this response, Claims 1, 4-7, 12, 16-22, 26-27, and 29-30 remain pending.

### **III. Claim Rejections**

In the Office Action, Claims 1, 4, 16, 19, 22, and 26 were rejected under 35 U.S.C. § 102(e) as being anticipated by U.S. Patent No. 7,366,930 to Gutman et al. (*Gutman*). Additionally, Claim 12 was rejected under 35 U.S.C. § 103(a) as being unpatentable over *Gutman* in view of Official Notice. Finally, Claims 5-7, 17-18, 20-21, and 27 were rejected under 35 U.S.C. § 103(a) as being unpatentable over *Gutman* in view of U.S. Patent No. 5,619,650 to Bach et al. (*Bach*). For at least the following reasons, Applicant respectfully requests that the rejections of Claims 1, 4-7, 12, 16-22, and 26-27 be withdrawn.

As discussed above, the Office Action rejected independent Claims 1, 16, 19, and 22 as being anticipated by *Gutman*. Independent Claims 1, 16, 19, and 22 each recite, in somewhat different language, a data throttle limiting the transfer rate of data from a first host to a second host where the throttle value is less than or equal to the least of a first data transfer rate of the first host, a second data transfer rate of the second host, **and a third data transfer rate of a network between the first and second hosts**, and wherein **the second and third data transfer rates are obtained during a communication session start-up process from signaling**. Applicant respectfully submits that *Gutman* at least fails to disclose these recitations of the independent claims for various reasons that will be explained in greater detail below.

*Gutman* appears to disclose a method for establishing an Ethernet link between two devices based on a power-related configuration (*Gutman*, col. 1, lines 56-59). In particular, *Gutman* describes the use of additional initial and preferred common link speed fields that are saved in the device configuration information (*id.*, col. 2, line 60 - col. 3, line 1). The initial or preferred common link speed may be less than another link speed supported by the first device (*id.*, col. 3, lines 31-33). When seeking to link to a second device during a power-saving mode, the first device may only advertise the lesser initial or preferred common link speed in an attempt to negotiate a connection with the second device at that lower link speed (*id.*, col. 3, lines 50-55).

As noted, the *Gutman* reference focuses on a method for establishing a connection in the form of an Ethernet link between two devices. The connection is established via autonegotiation, which occurs at the physical layer in the OSI model. In contrast, the independent claims deal with a communication session between a first and second host, not a physical connection or link between two devices. Communication sessions are implemented at the application, session, or transport layers in the OSI model, not the physical layer. It is improper to compare the throttling of a transfer rate during a communication session of the independent claims with the selecting of a linking mode during the establishment of an Ethernet connection of *Gutman*, as the two concepts are distinct and occur at different OSI model layers.

Furthermore, the independent claims recite that the second and third data transfer rates, namely the data transfer rates of the destination host and the network between the source and destination hosts, are obtained during a communication session start-up process. As previously explained, *Gutman* does not discuss a communication session or its associated start-up process, but rather a physical link connection and its establishment. The Office Action appears to equate the autonegotiation of the Ethernet link in *Gutman* with the communication session start-up process in the independent claims. Even if such a comparison was proper, which it is not for at least the reasons described above with respect to the OSI layers, the devices in *Gutman* do not have a physical connection to the network until the autonegotiation is completed, and therefore the devices do not yet have data transfer rates. It follows that the data transfer rates of the devices cannot be obtained during autonegotiation, as they do not yet exist. Potential linking modes of a device and actual data transfer rates of a device are simply not equivalent.

Even if, assuming *arguendo*, the devices of *Gutman* did have data transfer rates that were obtained during autonegotiation, *Gutman* is entirely silent with respect to obtaining the third data transfer rate of a network between the devices. In the Office Action, the Examiner states that “it is inherent that the [network] devices between the two devices also support the common [linking] speed [of the devices]” (Office Action, page 2). Whether the network between the devices supports the common link speed negotiated by the two devices is irrelevant to whether the actual network data transfer rate **is obtained** during autonegotiation. The Office Action further states that “the intermediate [network] devices must be considered for this slowest common link speed in order to enable the active communication” (*Id.*). Again, such theoretical “consideration” is irrelevant. Autonegotiation does not require **obtaining the data transfer rate** of a network between the two devices performing the autonegotiation, nor does *Gutman* suggest that it does. Therefore, *Gutman* fails to teach this affirmative recitation of the independent claims.

With respect to independent Claim 16, the claim contains the additional recitation that the communication session start-up process, during which certain data transfer rates are obtained and the throttle is set, is a Session Initiation Protocol (SIP) process. The specification clearly recites that “SIP is an application-layer control (signaling) protocol for creating, modifying and

terminating sessions with one or more participants” (Specification, paragraph 0057). As noted above, autonegotiation of an Ethernet link, as described in *Gutman*, occurs at the physical layer. Thus, independent Claim 16 can be further distinguished from *Gutman* for at least this additional reason.

Based on the foregoing arguments, Applicant respectfully asserts that *Gutman* does not teach or suggest all of the recitations of independent Claims 1, 16, 19, and 22 and respectfully requests that the rejection of these claims be withdrawn. Moreover, dependent claims 4-7, 12, 17-18, 20-21, 26-27, and 29-30 are therefore also patentable over any combination of the cited references at least due to their dependency from allowable independent base Claims 1, 16, 19, and 22.

Furthermore, the teachings of *Bach* do not cure the above-referenced deficiencies of *Gutman*, and indeed are not cited as such. In fact, the Examiner only cites *Bach* for teachings related to various high-level protocol layers. *Bach* does not teach or suggest establishing an Ethernet link connection at these high-level protocol layers, as an Ethernet link connection must be made at the physical layer. Accordingly, it would be improper to suggest that *Gutman* could be modified by *Bach* to produce such a result. Thus, the combination of *Gutman* and *Bach* does not teach each and every recitation of the currently pending claims.

Moreover, the Examiner appears to take Official Notice that SIP was a well-known protocol for creating sessions. For the reasons explained above, however, whether or not SIP was a well known protocol for creating sessions does not change the fact that the establishment of an Ethernet link connection as in *Gutman* is not related to a session and must be made at the physical layer. Thus, even if Examiner’s Official Notice were to be taken as fact, there is nothing to teach or suggest that its combination with the teachings of *Gutman* can result in the claimed invention. Accordingly, the combination of *Gutman* and Examiner’s Official Notice does not teach each and every recitation of the currently pending claims.

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#### **IV. Conclusion**

In light of the remarks above, Applicant respectfully submits that the application is in condition for allowance and respectfully requests that a Notice of Allowance be issued. The Examiner is encouraged to contact Applicant's undersigned attorney to resolve any remaining issues in order to expedite examination of the present application.

It is not believed that extensions of time or fees for net addition of claims are required, beyond those that may otherwise be provided for in documents accompanying this paper. However, in the event that additional extensions of time are necessary to allow consideration of this paper, such extensions are hereby petitioned under 37 CFR § 1.136(a), and any fee required therefor (including fees for net addition of claims) is hereby authorized to be charged to Deposit Account No. 16-0605.

Respectfully submitted,

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